No. 6 AND 7

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 6.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE,
Appellant,

v.

DELBERT O. STARK, A. F. STRATTON, A. R. DENTON, G. STEBBINS AND F. WALSH,
Appellees.

No. 7.

DAIRYMEN'S LEAGUE CO-OPERATIVE ASSOCIATION, INC.,
Appellant,

v.

DELBERT O. STARK ET AL.,
Appellees.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF NEW ENGLAND MILK PRODUCERS' ASSOCIATION ET AL. AS AMICI CURIAE.

REUBEN HALL,
30 Federal Street,
Boston, Massachusetts,

WALDO NOYES,
19 Congress Street,
Boston, Massachusetts,
Attorneys for Amici Curiae.

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BRIEF OF NEW ENGLAND MILK PRODUCERS' ASSOCIATION ET AL. AS AMICI CURIAE.

Foreword.

New England Milk Producers' Association, United Farmers of New England, Inc., Bellows Falls Cooperative Creamery, Inc., Connecticut Valley Dairy, Inc., Grand Isle County Cooperative Creamery, Inc., Granite City Cooperative Creamery, Inc., Milton Cooperative Dairy Corporation, St. Albans Cooperative Creamery, Inc., Mt. Mansfield Cooperative Creamery and Grain Association, Inc., Bethel Cooperative Creamery, Inc., Richmond Cooperative Creamery, Inc., Shelburne Cooperative Creamery Company, and Cabot Farmers' Cooperative Creamery, Inc., by their counsel, respectively submit herewith their brief as *amici curiae* in the within cause, all parties to this litigation having previously assented.

Statement of Interest.

The several co-operative associations whose names are set forth in the next preceding paragraph are all co-operative associations of producers of milk organized and existing under the laws of Massachusetts, Vermont and New Hampshire, respectively engaged in the marketing of milk in the greater Boston Marketing area. They are co-operative associations of producers determined by the Secretary of Agriculture as qualified to receive certain payments under the provisions of Section 904.10 of Order No. 4 as amended, regulating the handling of milk in the greater Boston, Massachusetts, milk marketing area, which section of said order was challenged as illegal by the appellees in their complaint filed in the court below.

Opinions Below.

The opinion of the District Court is reported in 82 F. Supp. 614. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 488) was entered on November 9, 1950, and is reported in 185 F. (2d) 871.

Jurisdiction.

The judgment of the court below was entered on November 9, 1950 (R. 488). The petitions for a writ of certiorari were granted April 16, 1951 (R. 491). The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254.

Questions Presented.

1. Whether the Agricultural Marketing Agreement Act of 1937 confers upon the Secretary of Agriculture latitude to provide in the Boston milk order for the payment, out of the producer-settlement fund, to co-operative associations of producers for the performance of market-wide services found by the Secretary to be necessary since 1941 in order to make effective the classification, pricing and pooling provisions of the milk order.

2. Whether the delegation of power to the Secretary of Agriculture in the Agricultural Marketing Agreement Act of 1937 to issue a milk order is so limited that the provisions included in the Boston order on the basis of evidence adduced at public hearings found by the Secretary to be incidental to, not inconsistent with the other provisions of the order and necessary to effectuate the other provisions of the order and conceded by the reviewing court below to be beneficial, helpful and pronounced aids to all participants

in the program since 1941 are as a matter of law not incidental to, are inconsistent with and are not necessary to effectuate the other provisions of the order or the declared policy of the Act.

3. Whether the provisions of a milk order may be held invalid as not being necessary and incidental when the record before the reviewing court does not include the extensive hearing record on which the Secretary based his findings and issued the regulatory provisions.

Statute and Order Involved.

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. 601 *et seq.*), which re-enacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended. The pertinent statutory provisions appear in Appendix A to the Brief for the Secretary of Agriculture.

The order involved is the order regulating the handling of milk in the greater Boston Marketing area (7 C.F.R. 1947 Supp. 904.1 *et seq.*). The order was amended on August 1, 1941, to provide for payments to co-operative associations of producers (6 F.R. 3762; 7 C.F.R. 1941 Supp. 904). The order was again amended on August 1, 1947, to include the provisions now in effect for payment to co-operatives (12 F.R. 4921; 7 C.F.R. 1947 Supp. 904). The relevant findings and pertinent provisions of the order appear in Appendix B to the Brief for the Secretary of Agriculture.

Statement.

This action was instituted as an alleged class action by five dairy farmers to enjoin the Secretary of Agriculture from making certain payments to co-operative associations of producers pursuant to the Boston milk order. The

complaint alleges (R. 1-7) that there is no statutory authorization for the provisions in the Boston milk order providing for payments to the producers' co-operative associations which perform services for the market as a whole and that such provisions in the order are therefore "without legal authority, and are unlawful and void."

These market-wide services in brief are (*a*) legislative activities consisting principally of continuous market analysis and the preparation and proof of the necessity for provisions of orders and amendments to bring about orderly marketing for the benefit of all producers and opposition to adverse propositions; (*b*) educational activities consisting of keeping all producers thoroughly informed of the operation of such orders and of current market and economic conditions affecting milk production and marketing through the regular distribution of publications issued by the co-operative associations, special bulletins, meetings to which all producers in the territory are invited, general press releases and radio programs with the view to obtaining and maintaining producer understanding of the order; and (*c*) handling activities consisting of maintaining a full supply of milk to take care of market needs at all times, coupled with providing a dependable outlet for producers' seasonal or other surplus.

The suit was originally dismissed by the District Court on the ground that the Act vested no legal cause of action in milk producers as distinguished from milk handlers who are regulated by the order, and its judgment was affirmed by the United States Court of Appeals for the District of Columbia. *Stark* v. *Wickard*, 136 F. (2d) 786. That decision, however, was reversed in *Stark* v. *Wickard*, 321 U.S. 288, by the holding that the Dairy farmers "have legal standing to object to illegal provisions of the Order," and the District Court was directed, in the remanding of the

case, to consider "the soundness of the allegations made by the petitioners in their complaint" and "whether the statutory authority given the Secretary is a valid answer to the petitioners' contention." The question of statutory authority for the payments was left to the trial court.

On remand, the case was heard on a record consisting of the transcript of the proceedings before the Secretary of Agriculture preceding the issuance of the 1941 amendments to the Boston milk order, and affidavits which had been submitted in connection with a prior motion for summary judgment. Although the Secretary amended the co-operative payment provisions in 1947, after an extensive hearing held in 1946 at which the entire subject was fully reconsidered, the transcript of the 1946 hearing was not offered in evidence or considered by the court.

The District Court held that the statute does not delegate authority to the Secretary to include in a milk order provisions for payments for market-wide services rendered by co-operative associations of producers, and the District Court enjoined the Secretary from making further payments under the Boston milk order. *Stark* v. *Brannan*, 82 F. Supp. 614. The effectiveness of the judgment was stayed by the District Court on condition that all such payments be held in escrow pending the final disposition of the case on appeal (R. 156). The co-operatives who qualified for payments are continuing to perform the services, but have been without receipt of payments for market-wide services rendered by them since January, 1949. The fund has now accumulated to approximately $400,000 and represents approximately the value of the services so rendered by the co-operative associations of producers of the Boston market. If the co-operatives are deprived of that sum, it means a corresponding and proportionate loss to them. The judgment of the District Court was affirmed by the United States Court of Appeals for the District of Colum-

bia, with Judge Edgerton dissenting. *Brannan* v. *Stark*, 185 F. (2d) 871 (R. 470).

Argument.

THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 AS AMENDED (7 U.S.C. 601 ET SEQ.) CONFERS ON THE SECRETARY OF AGRICULTURE AUTHORITY TO PROVIDE IN THE BOSTON MILK MARKETING ORDER FOR PAYMENTS TO THE CO-OPERATIVE ASSOCIATIONS OF PRODUCERS FOR MARKET-WIDE SERVICES.

The Act is the Agricultural Adjustment Act (48 Stat. 31) as amended May 9, 1934 (48 Stat. 672), and August 24, 1935 (49 Stat. 750, 7 U.S.C. 601 *et seq.*) as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. 601 *et seq.*).

The Act plainly sets forth the purpose of milk orders, prescribes the manner in which orders may be issued, and outlines the terms and provisions which such orders may contain. Section 8c (5) provides that, in the case of milk and its products, orders issued pursuant thereto shall contain one or more of the terms and conditions thereafter set forth and, except as provided in Section 8c (7), no others.

Section 608c (7):

"*Terms common to all orders.*

"In the case of agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

. . . . . .

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6) and (7) and necessary to effectuate the other provisions of such order."

The Congress in enacting this legislation to solve the "monstrous difficulties"[1] of this "exquisitely compli-cated"[2] business of milk marketing did not prescribe a code of specifics. The Act confers upon the Secretary broad powers to include provisions "incidental and necessary" to effectuate the terms and conditions specifically mentioned in the Act.[3] This power is auxiliary to the main provisions.

The difficulties and complexities of milk marketing are such that any plan to counteract the effects of disorderly marketing calls for frequent modification. The variety of changing situations demands flexibility within the purposes and scope of the program.

"The background and legislative history of this legislation leave no doubt that Congress gave to the Secretary broad discretion in its administration."[4]

The delegation of power to the Secretary to effectuate the policy of the Act and the provisions of the order by including suitable provisions therein is not novel. Like provisions are contained in a number of Federal statutes.[5] This court has held that the effectuation clause is the "central clue to the Board's powers."[6] Congress could not define with

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[1] *Dairymen's League Cooperative Association, Inc.*, v. *Brannan* (C.A. 2), 173 F. (2d) 57, 66.

[2] *Queensboro Farm Products, Inc.*, v. *Wickard* (C.A. 2), 137 F. (2d) 969, 974.

[3] *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 575.

[4] *Queensboro Farm Products, Inc.*, v. *Wickard* (C.A. 2), 137 F. (2d) 969, 977.

[5] Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. Sec. 78a *et seq.*; National Labor Relations Act, 49 Stat. 449, 29 U.S.C. Secs. 151-166; Public Utility Holding Company Act of 1935, 49 Stat. 803, 821, 15 U.S.C. Sec. 79k (b) (2); Commodity Exchange Act, 49 Stat. 1500, 7 U.S.C. Sec. 12 (a) (5); Emergency Price Control Act of 1942, Sec. 2 (a), 45 Stat. 268, 50 U.S.C. Appendix, 25; Fair Labor Standards Act, 52 Stat. 1064, 29 U.S.C. Sec. 208 (f).

[6] *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177.

detailed particularity the remedies to effectuate the policy of the Act. It must of necessity leave the adaptation of the means to the end to the discretion of the Board in the administration of the Act.[7]

It has also been held that it was proper to delegate authority to make regulations which would implement the general provisions of the Act.[8]

The findings of facts made by the Secretary, on the basis of evidence in the hearing record, in issuing the amended order which became effective August 1, 1941, that the payments to the co-operative associations of producers for market-wide services are incidental and necessary under Section 8c (7) (D) of the Act to effectuate the provisions of the order included under Section 8c (5) of the Act and that such payments are not inconsistent with Section 8c (5) of the Act are justified by the record as a whole. No claim is made by the appellees that these findings are not supported by the evidence. Indeed, the contention of the appellees is that as a matter of law the statutory terms "incidental and necessary" cannot be said to include payments to co-operatives for market-wide services even though such market-wide services are found to be necessary to effectuate the other provisions of the order.

Indeed, the court below held "there is no doubt that these services are pronounced aids to all participants in the marketing area . . . producers, handlers and consumers. This is so clear that it serves no purpose to describe the helpful effects in detail" (R. 484).

The co-operative service payment provisions were reconsidered by the War Food Administrator in 1944 in con-

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[7] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131. *Yakus* v. *United States*, 321 U.S. 414, 427.

[8] *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 574. *Warehime* v. *Varney*, 147 F. (2d) 238 (C.A. 6); cert. den. 325 U.S. 882. *United States* v. *Kelley*, 55 F. (2d) 67, 70 (C.A. 2).

nection with a proposal that the co-operative payments provisions be deleted from the Boston milk order.[9]

This finding was essentially approved and adopted by the Revised Report filed April 22, 1944, by the Director of Distribution.

"REVISED REPORT WITH RESPECT TO A PROPOSED MARKETING AGREEMENT, AS AMENDED, AND TO AN AMENDMENT TO ORDER NO. 4, AS AMENDED, REGULATING THE HANDLING OF MILK IN GREATER BOSTON, MASSACHUSETTS, MARKETING AREA.

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[9] In 1944 a finding was made by the Acting Director of Food Distribution, who had taken over the duties of the Secretary of Agriculture as to milk orders by direction of the President. The finding reads as follows:

"The present plan of payments to cooperatives, which became effective August 1, 1941, was based on the consideration that to achieve the benefits to all producers which the order is designed to provide two types of activity by producers' cooperative marketing organizations are desirable—(1) presentation of evidence at hearings concerning the needs of producers with respect to prices for milk and differentials to reflect handling costs to furnish an adequate basis for constructive amendments to the order, and (2) assumption of responsibility for a reserve of milk to meet the irregular needs of distributors which is essential in a market which provides market-wide equalization among all producers of the total value of the milk. Further, it is recognized that allowances for costs associated with providing services to the market should be separated from the allowance which reflects the additional cost of receiving milk at country plants compared to receiving it directly at city plants. From these considerations it was concluded that provision for payments to cooperative associations is considered necessary to equitably apportion the total value of milk among producers. The testimony in support of the proposal to completely eliminate this feature of the order does not show that these considerations were substantially erroneous." 9 F.R. 3059 (issue of March 21, 1944).

"Pursuant to 900.13 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders, there is hereby filed the revised report of the Director of Distributions with respect to a proposed amended marketing agreement and a proposed amendment to the order, as amended, regulating the handling of milk in the Greater Boston, Massachusetts, marketing area.

"The present plan of payments to cooperatives, which became effective August 1, 1941, was based on the consideration that to achieve the benefits to all producers which the order is designed to provide. . . .[10]

". . . numerous activities of producers' cooperative marketing organizations are desirable, such as presentation of evidence at hearings concerning the needs of producers with respect to prices for milk and differentials to reflect handling costs to furnish an adequate basis for constructive amendments to the order, study and research with respect to marketing problems common to all producers, educational activities designed to give producers a better understanding of the order, insurance to producers generally of a market for their milk, and assumption of responsibility for a reserve of milk to meet the irregular needs of distributors which is essential in a market which provides market-wide equalization among all producers of the total value of the milk."

[10] Underscored portion is from "Notice of Report and Opportunity to File Written Exceptions with Respect to A . . . Proposed amendment To The Order as Amended Regulating The Handling of Milk in The Greater Boston, Mass. Marketing Area," filed March 18, 1944 and signed by C. W. Kitchen, Acting Director of Food Distribution (Federal Register, Vol. 9, No. 57, pages 3057-3060, March 21, 1944). The revised report affirms and adopts this part of the preliminary report.

"Further, it is recognized that allowances for costs associated with providing services to the market should be separated from the allowance WHICH REFLECTS THE additional cost of receiving milk at country plants compared to receiving it directly at city plants. From these considerations it was concluded that provision for payments to cooperative associations is considered necessary to equitably apportion the total value OF MILK AMONG PRODUCERS. The testimony in support of the proposal to Completely eliminate this feature of the order does not show that these considerations were substantially erroneous.

"This revised report filed at Washington, D. C. the 22nd day of April 1944.

/s/ C. W. KITCHEN
Director of Distribution."

These provisions of the order were amended in 1947 after hearing upon seven proposals with respect to payments to co-operatives. Some of these proposals dealt with changes in the rates of payment. One of the proposals was to delete all provisions of the order for payments to co-operatives and another was to reconsider in all respects the co-operative payment provisions of the order (11 F.R. 640, 643-644). On the basis of the evidence presented at these hearings, the Secretary issued an amendment which completely revised the co-operative payment provisions of the order (12 F.R. 4921).

It should be noted that the record of the hearings covering the 1947 amendments is not before the court.

At the core of the difficulties of the fluid milk industry is the so-called "surplus problem" which was discussed by the Court in *Nebbia* v. *New York*, 291 U.S. 502; *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, and *H. P. Hood & Sons, Inc.*, v. *United States*, 307 U.S. 588.

It is well known that variations in demand and in the volume of milk produced, particularly the seasonal variations in production, create a situation where it is necessary in order to avoid shortages during some of the time that the supply should at all times exceed the minimum requirements of the fluid milk market. There must of necessity be a reserve supply sufficient at all times to meet the requirements of the fluid milk market. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 549.

Because of the biological nature of milk production, the number of cows sufficient to provide the market with its requirements for fluid milk during the period of low production in November and December will produce a quantity of milk during the spring months substantially in excess of the requirements of the market for fluid milk.[11] It is this excess production which creates the difficulties in fluid milk marketing. *Nebbia* v. *New York*, 291 U.S. 502, 517. *H. P. Hood & Sons, Inc.*, v. *United States*, 307 U.S. 588, 593.

There is nothing in the order which requires the handler to take the production of any given producer during the period of flush production. While it is true that some of of the larger handlers in the area have facilities for the handling and manufacture of this surplus production, most

[11] The production of milk in the Boston market in June is almost double that in November (R. 228-229). The demand remains relatively constant throughout the year. See also Report of the Federal Trade Commission Under Distribution and Sale of Milk and Milk Products (74th Cong. 2d Sess. H. Doc. No. 501), pp. 13-44; Gaumnitz and Reed, Some Problems Involved in Establishing Milk Prices (U.S. Department of Agriculture, 1937), pp. 53 *et seq.* In recent years, although on an annual basis the production of milk in the Boston milk shed has exceeded the requirements of the Boston market for fluid milk, there has been an insufficient supply during the fall and winter months to meet the fluid milk requirements of the market. Seasonality of Milk Deliveries in The Boston Milk Shed (U.S. Department of Agriculture, Bureau of Agricultural Economics June 1949), p. 2.

if not all of the smaller handlers are not so equipped. Indeed, the smaller handlers in the market look to the co-operatives to supply them with their requirements for fluid milk and to relieve them of the burden of responsibility of caring for any of this surplus production[12] (R. 69, affidavit of Chester W. Smith).

To properly care for the surplus production it is necessary to provide plants at which this milk may be processed into by-products. These plants represent a substantial investment and must be ready at all times to handle this excess production. These processing plants not only must be prepared at all times to handle the surplus, but must also be prepared to curtail or completely stop their manufacturing operations and furnish fluid milk in order to meet market demands. This disruption of the processing and manufacturing operations results in additional expense to the co-operatives. The producers in the marketing area benefit from these operations through the utilization of the milk in such manner as to insure the greatest possible return to producers. Because of the irregular nature of the surplus production and processing and the varying demands in the market for fluid milk, the by-products produced by the co-operatives are available only in odd lots. For this reason it is difficult, even impossible, to establish and maintain brand names and to assure to customers constant supply of the manufactured products.

In the market place these manufactured by-products, therefore, do not command as high a price as similar products produced in areas where the volume of production is sufficiently large so that a constant supply of manufactured products is available at all times. The fact that in spite

[12] R. 69, pp. 184-185, indicates that in November more than twice as many handlers were purchasing fluid milk from the co-operatives as had done so in June. (See also affidavit of Chester Smith. R. 68.)

of this unfavorable situation the co-operatives continue to absorb the surplus imposes a burden upon the co-operatives which we submit is beneficial to the market as a whole.

The proprietary handler cannot be expected to perform these services since, from the nature of their business, proprietary handlers are interested in the spread between the purchase price and the sale price of milk, thereby making profits to themselves rather than increasing prices to producers. A co-operative, on the other hand, is interested in securing the highest possible return for its members (R. 215).

The price which fluid milk commands in the market or which is obtainable under the order is related to the returns which can be had from the disposition of the surplus production. Without the facilities of the co-operatives for the disposition and manufacture of the surplus, the price for fluid milk would of necessity be substantially lower.

We submit that, if the value of milk is to be equitably apportioned among the producers and associations of producers, consideration must be given to having all producers whose milk is marketed in the Boston market participate in the unrecoverable expense of disposing of surplus milk and of maintaining these surplus handling plants of co-operatives. The payments to the co-operatives authorized by the challenged provisions of the order are designed, in part, to compensate the co-operative associations for the expenses and losses which they incur in utilizing milk to secure the highest possible returns to producers and thus such payments are necessary in order "equitably to apportion" the total value of milk among producers. Section 8c (5) (B) (ii) (d).

The pricing of milk is not static. It must reflect the changing conditions in the market. The co-operatives maintain on their staffs market analysts and economists who are engaged at all times in studying the market situa-

tion and developments both in the Boston area and in the contiguous area. These changing market conditions are analyzed and presented to the producers through publications issued by the co-operatives, meetings of producers to which both members and non-members of the co-operatives are invited to attend, press releases and radio programs available to producers, both members and non-members of the co-operatives.[13]

Based upon these changing conditions, applications for amendments to the order are presented to the Secretary. Evidence is presented at hearings called by the Secretary.

The individual farmer is not equipped to assemble and analyze the basic data upon which proposals for price changes may be submitted and substantiated.

An example of the activity of the co-operatives with respect to price and the benefits resulting to all producers, both members and non-members of the co-operatives, may be cited in a recent development in the Boston market.

In the early part of 1951 there appeared in the Boston market a product known as concentrated milk. This was advertised by the handler who presented this product for sale as fluid milk which had been reduced in volume to one-third and which by the addition of water could be restored to its original volume of fluid milk. It was intended and advertised as a fluid milk to replace or displace natural fluid milk which was available in the market.

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[13] *E.g.*, New England Dairyman, published monthly, carries a list of the times and stations through which its radio programs are available to producers in all sections of the New England milk shed. Each issue of the New England Dairyman, United Farmers of New England News and Our Milk regularly contains articles dealing with the production and utilization of the Boston milk shed, the factors determining the price outlets for surplus milk, current economic conditions, and from time to time proposed amendments to the Boston milk order and discussions relative thereto.

Under the provisions of the Boston milk order as it then stood, the milk used for the production of this concentrated milk was classified as Class II. The differential in value between milk used for fluid milk purposes and milk for Class II (surplus) purposes was approximately 4 cents per quart to the producer. In other words, in the accounting and computation of the blended price payable to the producers under the terms of the Boston order, the value of the milk used for the production of the concentrated milk was included in the computation at a price of approximately 4 cents per quart less than the value of the same quantity of milk if it had been classified as fluid milk. The consumer received only a portion of this benefit.

The co-operatives petitioned the Secretary for an amendment to the Boston milk order which would change the definition of Class I or fluid milk so that this product intended for fluid milk consumption would be classified as Class I or fluid milk.

At the hearing called by the Secretary on the petition of the co-operatives, evidence to substantiate the petition was presented by the co-operatives and an amendment was issued effective in the Boston market April 16, 1951, revising the definition of Class I or fluid milk to include the milk used for the production of concentrated milk.[14]

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[14] Hearing held March 12, 1951, pursuant to notice of hearing published 16 F.R. 2140, recommended decision published March 24, 1951, 16 F.R. 2658, final decision issued April 13, 1951, 16 F.R. 3247. The record of the hearing on this proposal is a public record in the Office of the Secretary of Agriculture. Examination of the record will disclose that, despite the fact that two of the large handlers in the Boston market appeared to be proponents of the proposed amendment to the Boston milk order, all the evidence in support of the proposal was submitted by the co-operatives and the evidence against the proposal was submitted by one of the large handlers in the Boston market.

THE LEGISLATIVE HISTORY OF THE ACT AND ITS CONTEMPORARY INTERPRETATION BY THE SECRETARY IN HIS ADMINISTRATION SUPPORT THE POWER OF THE SECRETARY TO INCLUDE WITHIN THE BOSTON FEDERAL MILK ORDER PROVISIONS FOR PAYMENTS TO CO-OPERATIVE ASSOCIATIONS PERFORMING MARKET-WIDE SERVICES WHEN THE HEARING RECORD SUPPORTS SUCH PROVISIONS.

In construing the legislation the courts should have regard for the remedial purposes which the legislation is designed to achieve. The statute should be broadly construed to accomplish its declared purposes.[15]

An analysis of the Act, we contend, clearly demonstrates that Section 8c (5) does not enumerate all the terms and conditions that may be included in a milk order.

Section 8c (5) (G) of the Act provides: "No . . . order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

Section 8c (13) (B) of the Act states that no order shall be applicable to any producer "in his capacity as a producer."

Section 10b (2) requires that each order "relating to milk and its products shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's share of such expenses as the Secretary may find will necessarily be incurred by such authority or agency during any period specified by him for the maintenance and functioning of such authority or agency."

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[15] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111; *Vermilya-Brown Co., Inc.* v. *Connell*, 335 U.S. 377; rehearing denied, 336 U.S. 928; *United States* v. *Ruzicka*, 329 U.S. 287, 292.

Section 8c (7) (D) provides that under "the incidental and necessary provisions" no provision may be included which is "inconsistent with" the classification, pooling and pricing provisions of Section 8c (5) of the Act.

The detail of prohibitions in the Act precludes the extension or enlargement of these exceptions by implication. The expressed prohibitions in the Act support the view that, aside from these limitations, the Congressional purpose was to authorize the Secretary under the plain language of Section 8c (7) (D) to include within the Boston milk order or any other order issued by him such incidental and necessary provisions as, in light of the evidence, the Secretary finds are incidental and necessary to the effectuation of the classification, pooling and pricing provisions of the order.

Section 10b (1) requires the Secretary "to accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as would be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress and as would tend to promote efficient methods of marketing and distribution."

Numerous Acts of Congress deal with co-operatives and declare the policy of aiding and encouraging the establishment, operation and growth of marketing co-operatives of agricultural producers.

The Agricultural Marketing Act of June 15, 1929 (49 Stat. 18, 12 U.S.C. 1141, 1141 (j)), expresses the policy of Congress to promote merchandising of agricultural commodities in such a way as to put agriculture on a basis of economic equality with other industries and the accomplishment of this end by "encouraging the organization of producers into effective associations of producers under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm

marketing system of producer-owned and producer-controlled cooperative associations and other agencies.''

This policy of the Government toward co-operative associations of agricultural producers is set forth in the Clayton Act, 38 Stat. 730, 15 U.S.C. 17; Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291; Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13b; Income Tax Law, 26 U.S.C. 101 (12); Commodity Exchange Act, 49 Stat. 1491, 7 U.S.C. 10a.

The reports of the Congressional Committees on the 1935 Act (49 Stat. 750), H.R. 1241, 74th Cong. 1st Sess. pp. 9-11, and S.R. 1011, 74th Cong. 1st Sess. pp. 9-11, point out that the provisions of Section 8c of the Act embodied the methods employed by co-operative associations.

At the time of the adoption of that Act there was in effect in the Chicago market a check-off of 1 cent per hundred weight on the milk of all producers whether or not members of the co-operative. This was later increased to 2 cents and then to 3 cents per hundred weight for an adjustment fund to take care of surplus and advertising.

There were also in the marketing agreement and license for the Twin City area, No. 5, issued in August 1933, provisions whereby dealers who purchased milk of non-members of the co-operative should pay to such association the difference between the price which the association paid to its members and the class price for the milk as a service charge for regulating the supply. This Twin City license was in effect at the time of the enactment of the Marketing Agreement Act of 1937 and was one of the licenses and agreements ratified by the 1937 statute.

Under the Secretary's instruction under Section 10(b) ''to accord . . . encouragement . . . to cooperative associations . . . to promote . . . efficient . . . marketing . . .'' he is under compelling responsibility to be sure that milk orders which apply the prior marketing methods of co-

operatives to the entire market do not, by such application, result in inequity to the co-operatives. Market service payments to co-operatives serve this purpose in the Boston market and are thus squarely in line with the Act.

The declarations of policy by the Congress in the legislation declaring the policy of the Government toward co-operatives and the statement by the Congressional Committees in enacting this legislation give force and support to the position of the appellant that the incidental and necessary clause, Section 8c (7) (D), should be broadly construed to support the power of the Secretary to include the co-operative payments provision in the Boston milk order.

Within a few months after the enactment of the Agricultural Marketing Agreement Act the Secretary of Agriculture issued an order regulating the marketing of milk in the New York market.[16] Included in this order was a provision for payments to co-operative associations similar in their nature to the payments challenged by this litigation.

There was also a provision in that order for certain "diversion payments" which were payable alike to co-operative and proprietary handlers for certain services performed by them in connection with the handling of surplus. These provisions prior to the order being made effective were given wide publicity by the Secretary.

The order was challenged in the District Court and the District Court ruled with respect to the provision relating to the co-operative payments that the Secretary was without statutory authority to include such a provision within the New York order.[17] Upon review this court held that the handlers had no standing to challenge the propriety of these

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[16] Order No. 27, 7 C.F.R. 927.1 *et seq.*

[17] *United States* v. *Rock Royal Co-operative, Inc.*, 26 F. Supp. 534, 548.

particular provisions of the New York order.[18] Following the decision of this court, the Secretary reissued the order retaining within it the provisions for payments to co-operatives.

The services for which the deductions are allowed under the co-operative payments provision of the Boston milk order are described in the legislative history of a bill containing a clarifying amendment on this point. This bill was known as S. 3426, 76th Cong. 3d Sess.

The Secretary of Agriculture, in commenting to the Senate Committee on Agriculture respecting Section 4 of S. 3426 made the following comment:

> "Section 4 amends Section 8c (5) (C) by providing specific authority for the making of certain payments out of any pool or funds, where the market-wide pool plan of settlement is used, to cooperative and to operators of plants for certain services performed. Such payments are frequently necessary to insure adequate supplies of milk at all times within the market and to make proper arrangements for the handling of the surplus. Owing to the different services performed by the various factors in the milk market, the making of such payments will permit more equitable operation of milk orders."[19]

Accompanying the Secretary's letter was a comparison of the Agricultural Marketing Agreement Act of 1937 before and after amendment as proposed by S. 3426, with explanatory remarks.

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[18] *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 560.

[19] Record of Hearings Before the Subcommittee of the Committee on Agriculture and Forestry, United States Senate, 76th Cong. 3d Sess. on S. 3426.

With respect to Section 4 of that bill, the reason assigned by the Secretary in support of the proposed amendment stated as follows:

"Reason.—In order to make definite and certain the Secretary's authority in this regard and to settle the question that insufficient standards are spelled out in the act to guide the Secretary, it is regarded as essential that the law be amended in the respects contemplated by Section 4 of S. 3426.

"The market services for which these payments may be made to a qualifying cooperative are clearly set forth in the brief of the United States Government in the case of *United States* v. *Rock Royal Co-operative, Inc., et al.* (307 U.S. 533, 59 S. Ct. 993, pp. 158 et seq.), which may be paraphrased as follows:

"(1) Service performed in the supplying Class I milk to the marketing area in times of short supply;

"(2) Service performed in the utilization of milk in times of long supply in such manner as to insure the greatest possible return to producers;

"(3) Service performed by the maintenance throughout the year of facilities for handling the seasonable surplus even though these facilities can be employed only during the flush season;

"(4) Service performed for the market by the employment of measures during flush periods of production to secure the utilization in fluid form of milk near to the market, and the utilization in manufactured form of milk produced at the edge of the milkshed, thus reducing transportation charges which must be shared by all producers;

"(5) Miscellaneous services performed for the benefit of the entire market with respect to weights, tests, market outlets, etc.

"The amendment proposed in section 4 of S. 3426, namely part (I) thereof, will make it clear and certain that the Secretary of Agriculture in his discretion has full power to fix differentials in favor of cooperative associations which are rendering these or similar services and which services tend to effectuate the public policy of the Marketing Agreement Act. By the amendment the Secretary will have authority to fit such payments appropriately to the value of the service rendered.

"It is to be noted that as a prerequisite to receiving any such payment, the cooperative must be bona fide and under the exclusive control of its member-producers. Furthermore, it must be in full compliance with all provisions of the marketing order which govern it."[20]

In the report discussing Section 4 of the Senate Committee on Agriculture, the Committee said:

"Section 4 of the amending bill amends section 8c (5) (C) of the Act by providing specifically for the segregation, from the total value of milk as fixed by the order, of sums to provide reasonable compensation for two distinct kinds of marketing services as indicated in the provisions designated as (I) and (II). This authority is considered as being involved in the power to fix minimum prices to handlers and the manner of making payments to producers already contained in the act. Hence, the purpose of section 4 is to establish more explicit standards by which the Secretary shall be guided in providing for such compensa-

[20] Record of Hearings before the Subcommittee of the Committee on Agriculture and Forestry, United States Senate, 76th Cong. 3d Sess. on S. 3426, p. 26.

tion. Both types of services are definitely associated with the proper functioning of an order program and the effectuation of the policy of the act."[21]

S. 3426 contained a large number of other amendments. The bill was passed by the Senate but died in the House Committee. Although other amendments had been vigorously opposed before the Senate Committee, this particular amendment, Section 4, met with no objection.

The action of the Senate indicates a legislative policy favorable to the interpretation by the Secretary as to the scope of the incidental and necessary authorization in the Act.[22]

The failure of the House to take any action on the bill is not to be taken as disapproval by the House of co-operative payment provisions in milk orders.[23]

The economic objective of milk orders was modified in some respects by the Act of July 3, 1948 (62 Stat. 1258, 7 U.S.C. Supp. IV, Sec. 602(1)), but the Congress provided in title III, Sec. 302(e), of that enactment (7 U.S.C. Supp. IV, Sec. 672) that all orders then in effect "shall continue in effect without the necessity for any amendatory action" but shall be continued in effect only to establish and maintain such orderly marketing conditions as will tend to effectuate the declared purpose of the Act. No change was made in the language of the Act now under consideration.

Provisions for co-operative payments were included in the New York milk order in 1938 (7 C.F.R. 927.1 *et seq.*). The Boston order was amended in 1941 to provide for co-

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[21] Senate Report No. 1719, 76th Cong. 3d Sess. pp. 7 and 8.

[22] *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 329. *Porter* v. *Murray* (C.A. 1) 156 F. (2d) 781, 785.

[23] *Gemsco, Inc.*, v. *Walling*, 324 U.S. 244, 260-265.

operative payments and subsequently provisions for co-operative payments were included in the Cincinnati milk order (7 C.F.R. 965.1 *et seq.*) and similar provisions were included in the Dayton-Springfield order (7 C.F.R. 971.1 *et seq.*).

Various milk orders have been amended from time to time to provide for deductions in the computations of the blended price for payments similar to the co-operative payments. The original New York order had provisions for diversion payments to handlers for marketwide services (9 C.F.R. 1938 Supp. 927.1 *et seq.*). For a long period of time the Secretary has broadly construed the Act in applying it to a wide variety of economic problems in order to bring about orderly marketing, insure in the public interest an adequate supply of milk throughout the year, and also accord proper recognition and encouragement to producer-owned and producer-controlled co-operative associations as required by the Act.

The failure of Congress in the Act of July 3, 1948, c. 827, 62 Stat. 1258, to make any change in the language of the Act now under consideration and by the express provision entitled III, Sec. 302(e), that all milk orders in effect "shall continue in effect without the necessity for any amendatory action," indicates an implied legislative recognition and ratification of the administrative construction of the Act. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 488-489. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365.

The incidental and necessary provision is to be viewed as part of the whole texture of the Act and of the economy to which the Act applies. The legislation is to be broadly and liberally construed to accomplish the declared purposes of the Act. Congress must of necessity entrust to the administrative agencies the responsibility of selecting the

means of achieving the statutory policy. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604.

The relation of the remedy to policy is peculiarly a matter for administrative competence and the judgment of the Administrator is entitled to the greatest weight. *Gemsco, Inc.* v. *Walling*, 324 U.S. 244. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398. *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 105.

The settled administrative interpretation over a period of approximately fifteen years should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson*, 280 U.S. 183, 193. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549.

THE PAYMENTS TO CO-OPERATIVE ASSOCIATIONS FOR MARKET-WIDE SERVICES ARE NOT INCONSISTENT WITH THE PROVISIONS OF SECTION 8c (5).

The court below held that the co-operative payment provisions in the Boston milk order were not "not inconsistent" with the terms and conditions of Section 8c (5) of the Act. This ruling was based on a misconception by the court that these payments to the co-operatives went to producers who are members of qualified co-operatives (R. 482).

The court failed to distinguish between the co-operatives and their members. There is nothing in the record to support the court's holding that a single penny of the payments to the co-operatives for market-wide services was distributed to the members or that the members of the co-operatives received more money for their milk than non-members. The co-operatives are separate and distinct

entities from their members.[24] The performance of the market-wide services by the co-operatives results in substantial expense to the co-operatives. Since such expense must be reflected in the returns to their producers, it would be difficult, if not impossible, for a co-operative to continue to perform these services without compensation. These payments are but a partial reimbursement to the co-operatives for the expenses incurred by them in performing the market-wide services.

To be "inconsistent" with the terms and conditions specified in Section 8c (5) of the Act, the challenged provisions of the order must be so repugnant and antagonistic as to make it impossible for both to exist—one must nullify the other. There must be positive repugnance between the two provisions.

The provisions of Section 8c (5) require uniform class prices and uniform blended prices. If the co-operatives render these services at a loss and have to surcharge members, their members would get less than non-member producers and thus a basic purpose of the Act would be defeated. If the co-operatives did not render these services, because they could not do so except at a loss, chaotic conditions in the market would result and much of the time, prices to producers would be unduly depressed, thus likewise violating one of the basic purposes of the Act.

The co-operative payment provisions do not in any way prevent or interfere with the making of adjustments detailed in Section 8c (5). Payments to co-operatives for market-wide services are deducted before the uniform blended price is determined. There is nothing in the Act or in the order which makes it mandatory that the uniform

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[24] *Maryland and Virginia Milk Producers* v. *District of Columbia*, 119 F. (2d) 787, 792 (C.A. D.C.). *Farmers Union Cooperative Co.* v. *Commissioner*, 90 F. (2d) 488, 491 (C.A. 8).

blended price paid to producers shall equal the total value of the milk as computed under the provisions of the order.

The holding of the court below with respect to the meaning of the "inconsistent" limitations in Section 8c (7) of the Act would affect many other provisions for deductions in various milk orders. In the New York milk order (Order No. 27), issued in 1938 a few months after the enactment of the Agricultural Marketing Agreement Act of 1937, there was a provision for payments to handlers, both co-operative and proprietary, for performing market-wide services. These payments were for the purpose of compensating handlers for diverting surplus milk from fluid milk plants to manufacturing plants. These diversion payments are described and applied in *Grandview Dairy, Inc.*, v. *Jones*, 157 F. (2d) 5 (C.A. 2); cert. den. 329 U.S. 787. These diversion payments are also described in the Rock Royal case.

Other examples of deductions not specifically mentioned in Section 8c (5) of the Act are the provisions for deductions from producers in the summer months to pay producers for production during winter months contained in the Louisville order (7 C.F.R. 946, 7 (b) (a)) and other orders and the deduction for a reserve fund from producers in one month for later accounting to producers whose personnel has changed contained in the Boston milk order and many other orders.

These orders involve complicated marketing situations which the Act requires to be considered. These vary in different markets. The Act must be construed to give the Secretary wide discretion in the auxiliary provisions to be included in orders or the orders will fail to achieve the purpose Congress intended. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533. Meaning and significance must be given to each provision of the statute. *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345. *United States* v. *Raynor*,

302 U.S. 540. *United States* v. *Alpers*, 338 U.S. 680. *Vermilya-Brown Co., Inc.* v. *Connell*, 335 U.S. 377, 386.

THE FINDINGS OF THE SECRETARY BASED UPON SUBSTANTIAL EVIDENCE IN THE HEARING RECORD AS A WHOLE THAT THE COOPERATIVE PAYMENT PROVISIONS ARE "INCIDENTAL . . . AND NECESSARY" TO EFFECTUATE THE OTHER PROVISIONS OF SUCH ORDER ARE CONCLUSIVE.

Considerable flexibility is provided by Section 8c (7) (d) as to the terms and conditions which may be included in milk orders. Such terms and conditions must be auxiliary to those definitely specified.

"Incidental" has been defined as something additional, accessory or collateral to something else as primary.[25] The word "necessary" does not mean and should not be construed to mean "indispensable, inevitable or vital" nor merely "convenient or profitable," but something in between.[26]

The incidental and necessary provision of the Act must be viewed as part of the whole texture of the Act and in light of the policy which the Act is designed to effectuate. This is a remedial statute and is to be construed liberally to suppress the mischief intended to be put down and to advance the remedy which it was intended to afford. In construing a remedial Act, authority to include incidental and necessary provisions in an order or regulation must include power to include such provisions as are reasonably suitable for carrying into execution the powers expressly granted and to effectuate the broad purposes of the Act.

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[25] *Builders Club of Chicago* v. *United States*, 58 F. (2d) 503, 505. *The Robin Goodfellow*, 20 F. (2d) 924.

[26] *Armour & Co.* v. *Wantock*, 323 U.S. 126, 129-132. *Borden Co.* v. *Borella*, 325 U.S. 679, 682-684.

Gemsco, Inc. v. *Walling*, 324 U. S. 244; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398.

Broad standards for administrative action result from the necessities of modern legislation dealing with complex economic and social problems. It has been held that, where Congress has entrusted the selection of the means of achieving the statutory policy, the relation of remedy to policy is peculiarly a matter for administrative competence and its judgment is entitled to the greatest weight.[27]

In reviewing administrative action, the rule of substantial evidence based on the hearing record as a whole is applied where no other standard is prescribed by statute. The validity of the challenged provisions of the order is to be tested by whether substantial evidence in the hearing record as a whole supports the findings.

The findings of fact are conclusive when supported by substantial evidence on the record as a whole.[28] These findings cannot be set aside simply because different inferences may be drawn from the evidence. The requirement of substantial evidence on the record as a whole does not require proof beyond a reasonable doubt, but only such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[29]

It is the duty and power of the Secretary, not the courts, to draw inferences from the facts in the hearing record and to appraise conflicting and circumstantial evidence. It is not the reviewing court's function to substitute its own inferences of fact for th agency's where the latter have

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[27] *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 105.

[28] *National Labor Relations Board* v. *Denver Building and Construction Trades Council* (decided June 4, 1951),—U.S.—, 95 L. Ed. 782, 792.

[29] *Hughes* v. *Securities & Exchange Commission*, 174 F. (2d) 969, 974.

support in the record. The agency's determinations, if not prohibited by statute, is to be accepted if it is supported by substantial evidence on the record as a whole.[30]

It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the Congressional policy to infinitely variable conditions constitute the essence of the program. *Lichter* v. *United States*, 334 U.S. 742, 785.

The duty of a reviewing court is at an end when it becomes evident that the action of an administrative agency is based upon substantial evidence and is consistent with the authority granted by the Congress. *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194.

Questions of statutory interpretations especially arising in the first instance in judicial proceedings are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute, but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited and the administrative interpretation is to be accepted if it has warrant in the record and a reasonable basis in law.[31]

Contemporaneous and consistent construction of the statute by its Administrator is entitled to great weight. *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111.

The Secretary's interpretation of the Act and his application of it in doubtful situations are entitled to greatest weight. *National Labor Relations Board* v. *Denver Build-*

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[30] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111. *Universal Camera Corp.* v. *National Labor Relations Board* (decided February 26, 1951),—U.S.—, 95 L. Ed. 304, 313.

[31] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111.

ing and Construction Trades Council (decided June 4, 1951), —U.S.—, 95 L. Ed. 782, 792.

Nothing in the statute's background, terms or purposes indicates that its scope is to be limited without regard to the facts presented. Nothing indicates that the term "incidental—and necessary" is to be regarded as a term of art having as a matter of law a definite and restricted meaning so that its application is to be ascertained without reference to the factual situation. There is no issue as to whether substantial evidence supports the Secretary's findings (R. 474). There is therefore nothing for the court to review.

The appellees contend that under no circumstances and without regard to the evidence, the Secretary as a matter of law may not include within the terms and conditions of the Boston milk order provisions for payments to cooperatives for market-wide services. Such a narrow construction of the Act disregards the rule that in construing legislation the court must have due regard for the Act as a whole and give proper consideration to the purposes to be achieved by the Act. Substantial evidence on the record as a whole supports the Secretary's findings.

Plain reading of the statute in the sense in which Congress has obviously used the terms permits the inclusion in a milk order of any provision other than those specifically prohibited which, on the basis of the hearing record as a whole, the Secretary finds is incidental to the classification and pricing provisions and necessary to effectuate those provisions. Any such application of the statute must therefore be decided on the basis of the evidence in the hearing record, and if substantial evidence on the record as a whole supports the Secretary's action, the provisions of the order are to be sustained on judicial review.[32]

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[32] *O'Leary* v. *Brown Pacific-Maxon* (decided February 26, 1951), —U.S.—, 95 L. Ed. 341.

The findings of the Secretary on the basis of the evidence at a public hearing carry a presumption of the existence of a state of facts justifying the action.[33]

There is no issue of fact in this case. The provisions in the order are authorized by the Act. The holding of the court must be reversed and the Government's motion for summary judgment should be granted.

Conclusion.

For the foregoing reasons the judgment of the lower court sustaining the amended bill of complaint should be reversed and the amended complaint should be dismissed.

Respectfully submitted,

REUBEN HALL,
30 Federal Street,
Boston, Massachusetts,
WALDO NOYES,
19 Congress Street,
Boston, Massachusetts,
Attorneys for Amici Curiae.

[33] *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 567. *Queensboro Farm Products, Inc.*, v. *Wickard* (C.A. 2), 137 F. (2d) 969, 977.